F. M. S. REPORTS

[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
October 20, 1934.
[APPELLATE JURISDICTION]
THOMAS, C.J. (F.M.S.), HUGGARD, C.J. (S.S.)
AND TERRELL, J.
May 2, 1935.

JOHN EDGAR JONES.....Plaintiff-Appellant
v.
P. L. S. K. R. PALANIAPPA CHETTY.....
Defendant-Respondent

[PERAK CIVIL APPEAL No. 12 of 1934]

The Land Code, 1926, sections 111, 147, 149 *and 152—Charge of land held under Grant, Lease or Certificate of Title—Right of chargee to sue for balance due having exhausted his remedies under the Land Code.*

The words "subject to charge" in section 152 of the Land Code, 1926, are merely descriptive and are not intended to indicate that the charged land is to be sold subject to the charge.

When land is sold at the instance of a chargee it vests in the purchaser free from the charge in respect of which the land was sold and all subsequent charges, and it makes no difference whether the purchaser is the chargee himself or a stranger. It is only the land which is freed and discharged from all liability and there is nothing in the Land Code, 1926, which relieves the chargor of his liability to repay the balance of the money which he has borrowed.

Decision of Howes, J., reversed.

John L. Woods for the plaintiff.

S. C. Goho and *B. K. Das* for the defendant.

Cur. Ad. Vult.

HOWES, J.—In this case, the plaintiff claims the sum of $20,952.42, interest and costs being balance due on a transaction between the parties. The correctness of the figures is admitted by the defendant.

The facts are as follows:—

In May, 1931, the defendant borrowed from the plaintiff the sum of $25,000/-, and as security therefor on the 23rd May, 1931, executed a Statutory Memorandum of Charge No. 2353/31 (Schedule XXIV (a) under section 129 of the Land Code 1926) whereby the defendant undertook to repay the chargee the sum on the 23rd November, 1931, and also interest at 9/60 per cent per annum, by monthly payments of $200/-.

Default was made by the defendant in payment, and subsequently, an order for sale was obtained from the Court under section 149 of the Land Code, at a reserve price fixed under section 150 (ii). At the first sale the reserve price was not reached. A second sale produced the same result. A third sale was fixed for the 23rd December, 1933, at a reduced reserve price of $9,600/-. The Plaintiff-Chargee was given liberty to bid, and as the result, he bought in the land at the price of $9,610/-, and was, on the 27th January, 1934, registered as the proprietor of the land by Transfer No. 289/34 "free from Charge No. 2353/31."

The Chargee has set-off the sum of $9,610/- in partial satisfaction of the amount of the principal sum and interest due to him under the charge and costs.

He now sues for the balance, interest, expenses and costs.

The defence is that the charged land having been sold at the instance of the Chargee, the said charge has ceased to exist and that the covenant to pay the principal and interest has also ceased to operate. Further, that as the land was purchased by the Chargee freed and discharged from all liability on account of the charge, the Chargee is not entitled to maintain this suit.

On the 24th January, 1934, the Chargee executed a "Memorandum of Discharge of Charge" (Schedule xxv under section 130 of the Land Code) whereby he acknowledges the receipt of $9,610.00 "in partial satisfaction and discharge of Presentation No. 2353/31" (the charge in question). This discharge was duly registered on the 27th January, 1934, as a partial discharge, and appears on the Certificate of Title, immediately above the entry of the "Transfer" to the Chargee, on the same date, in which Transfer the land is described as "free from Charge No. 2353/31."

On the certificate of transfer, Schedule XXXIV (under section 152 of the Land Code) by which the bailiff, as an officer of the Court, transfers the land to the Chargee "subject to the annual rent and leases, charges or other registered interests hereunder written" appears the following:—

Annual rent $1.65.

Leases, charges or other registered interests (if any) Nil.

This certificate indicates that the land was sold to the Chargee subject only to the rent, and not to any charge.

The question is:—What has become of the charge, or rather of so much of it as has not been satisfied?

Before going further, it will be necessary to consider section 130, under which the Memorandum of Discharge was given.

This section deals with charges generally, whether given in respect of land held under Entry

in the Mukim Register or land under Grant, Lease of State Land or Certificate of Title; and as amended by Enactment 31 of 1928 section 14, Section 130 starts:—

> "Where any charged land is intended to be discharged from the whole or part of the moneys secured by the charge, or when part of the land comprised is intended to be discharged from the whole of the moneys secured thereby, the Chargee shall sign a memorandum of discharge in one of the forms in schedule XXV."

It will be noted that the original schedule XXV in the Land Code consisted of one form only, which was a form of receipt for money paid alternatively in "full" or "partial" satisfaction and discharge of the charge.

In 1928, by Enactment 31, section 32, the original schedule was amended by numbering it as XXV (a); and an additional form of discharge XXV (b) was added, which simply records the fact that "Charge No——....has been satisfied and discharged."

The object of this amendment is not clear to me, unless it was the intention that the original form XXV (a) should be used only in cases where a part of the land was released from the charge. If this be so, form XXV (a) does not appear to carry out this intention.

Section 130 is ordinarily only applicable in cases where the parties to a charge come to an arrangement between themselves. The Chargee is to take to the registering authority a Memorandum of Discharge in form (a) if the discharge is partial; in which case, the registering authority makes a memorial upon the original and duplicate memoranda of charge, as to the extent to which the charge has been satisfied. He then returns the duplicate memorandum of charge to the Chargee.

If the charge has been wholly satisfied, and schedule XXV (b) is used, the registering authority destroys the duplicate memorandum of charge.

In the ordinary course, the only person who can discharge a charge is the Chargee; although in the case of a sale of land held under the Mukim Register, by section 147, the Collector is, after registration of the transfer of the land to the purchaser, required to make a memorial on the register and on the issue documents, cancelling the charge in satisfaction of which the land was sold. Also, under Enactment 12 of 1933 section 214, where land is sold for quit rents, the purchaser of the land acquires it free from all prior encumbrances.

In the present case, the Chargee has acknowledged the receipt of $9,610 in partial satisfaction and discharge of the charge. Presumably, it was necessary for him to fill up Schedule XXV (a), in order to get the partial discharge of the charge recorded in the Register and on the Certificate of Title; otherwise the whole charge would have remained unsatisfied.

By what authority the Bailiff recorded, on the certificate of transfer on the 23rd January, 1934, "Charges (if any) Nil" I do not know. At that date, the charge had only been satisfied as to $9,610; so that the greater portion of it remained unsatisfied, and the land could only be transferred subject to the unsatisfied portion of the charge.

For some reason, the Land Code makes a distinction between the procedure to be followed after a sale of land held under the Mukim Register and land held under a Certificate of Title, as is the case in the present suit.

In the former case, under section 144, the Collector, instead of the "officer of the Court," signs a Memorandum of Transfer Schedule XXXIII (amended form 1932 Enactments, page 436). In that form, the land is transferred "subject to the annual rent and leases, charges or other registered interests specified hereunder." In this form, the word "charges" must refer to charges prior to that in satisfaction whereof the land has been sold, (section 147 (ii)) as, by section 147 (i), the land is transferred to the purchaser "freed and discharged from all liability on account of the charge in satisfaction whereof the land has been sold or of any charge registered subsequently thereto.....and the Collector shall upon registration of such transfer make a memorial upon the register and issue documents of title cancelling such charge or charges."

From this, it is clear that on a sale at the instance of a Chargee of Mukim Land, the transferee, whether he be the Chargee himself or some other purchaser, takes the land free of all charges; and the charge is cancelled. In this respect, section 147 clearly overrides the provisions of Section 111, which deal with the transfer of land subject to a charge.

It is now necessary to consider the procedure and effect of a sale by order of the Court, of land held under a Certificate of Title.

This is governed by sections 149 to 154 of the Land Code.

After default in payment, and notice, the Chargee calls on the Chargor to show cause why the land should not be sold by auction under the direction of the Court; and if no cause is shown,

the Court orders such a sale, and fixes the reserve price at the sum of the principal and interest, plus the expenses of the sale and costs.

The Chargee may bid; the land is sold to the highest bidder; and on payment of the purchase price, the officer of the Court (i.e., the bailiff) certifies in the form in Schedule XXXIV that the land has been sold under the authority of the Land Code. The bailiff then delivers this certificate, with the issue document of title, to the purchaser, who presents these documents to the Registrar, " who shall receive the said certificate in all respects as a valid transfer of the said land therein mentioned and shall register the same."

Under section 154, the Court prepares a scheme of ranking of the price obtained, as described. After payment of any rent or fees due to the State and costs, the first charge on the land is paid off; then subsequent charges, in order of priority; the balance is then paid to the proprietor of the land charged; who would generally be the Chargor.

Before going further, it is necessary to refer to the Certificate of Transfer Schedule XXXIV, and the operative words, viz.

> " Now I (i.e., the Officer of the Court) do hereby transfer the said land to the said A.B. (the purchaser) subject to the annual rent and charges hereunder written."

Then follows a space for the " Annual rent $.... —and " Charges....."

Where the reserve price or above it is bid at the sale, no difficulty arises; if it is not, under section 153, the officer of the Court may adjourn the sale, and order the land to be again put up for auction at a reduced reserve price; as happened in the present case.

What is then the position of a purchaser who buys the land at a price below the original reserve price, and therefore not sufficient to satisfy the claim of the Chargee, whether the purchaser be a stranger, or, as in the present case, the Chargee himself?

Has he bought the land subject to the partially satisfied charge, as the form of Certificate of Transfer would indicate, and thereby as a transferee, under section 111 taken over the obligation of the Chargor?

In the course of the arguments of Counsel, reference has been made to other jurisdictions (principally in Australia and New Zealand) in which the Torrens system is in force. In all these, as far as I can see, whether the sale is at the instance of the Mortgagor or under the direction of the Court, the transfer vests in the purchaser the estate or interest mortgaged, free from subsequent incumbrances, as though transferred by the mortgagor (*Hogg* "Australian Torrens System" page 950).

Mr. Woods, for the plaintiff, has pointed out that in some of the jurisdictions referred to, the word "mortgage" is used in the same sense that it is in England, and carries similar rights e.g., the power of sale without reference to the Court, and the right to foreclose; and that the cases decided in Australia and other countries are therefore inapplicable in the Federated Malay States, where such rights do not arise under a " charge." It seems to me that the word "mortgage" was adopted by these other jurisdictions as one, convenient to express the essence, and not merely the form of the transaction, viz., not to transfer property, but merely to secure the repayment of a loan; as is indicated by the definition of the word in the various Statutes. For instance, under the Fiji Ordinance, from which, it seems to be admitted, the Federated Malay States Land Code was taken, "Mortgage" is defined as "Any charge on land created merely for securing a debt and the instrument creating the same" and in section 62 of the same Ordinance it is stated, "Mortgage and encumbrance under this Ordinance shall have effect as security but shall not operate as a transfer of the land thereby charged." In other jurisdictions it is similarly defined as a charge on land for securing a debt or loan. (*Hogg* page 881). Any rights given to "Mortgagees" in other countries under the Torrens system, arise only by particular Statutes; and it is immaterial whether the transaction is called a "Mortgage," as in Fiji, or a "Charge," as in the Federated Malay States.

Reference to the Fiji Ordinance No. 34 of 1876 section 63 et seq. shows that the procedure is almost identical with ours. In case of default by the Mortgagor the sale is carried out under the direction of the Registrar of the Supreme Court; under section 4 of Ordinance No. 1 of 1883 (which repealed sections 67 and 68 of the former Ordinance) the mortgagee may bid, and the land shall be sold to the highest bidder and transferred to the purchaser on the certificate of the Registrar. Under section 5 of the same Ordinance where the upset price is not reached, this may be reduced, and the land be put up for sale later, at the reduced upset price.

These two sections have been followed almost word for word in our sections 152 and 153.

Section 71 of the Fiji Ordinance No. 34/76 provides that the bidder in whose favour the certificate has been issued and registered, "shall be the absolute owner of the land so sold as fully

and completely as if he had been the original grantee in a Crown grant of the said lands."

In our Land Code there is no corresponding section to this; nor is its meaning clear to me. At first, it would suggest that the bidder obtained the land freed from any mortgage or charge not wholly satisfied, but in Fiji the certificate of the Registrar of the Supreme Court transfers the land "subject to the mortgages and encumbrances notified hereunder" in the same manner as does the certificate of transfer in the Federated Malay States. However, I am not concerned with the interpretation of the Fiji Ordinance; and no guidance in interpreting our Land Code can be obtained from it, nor from the Statutes of other countries under the Torrens system.

Under our Code as its stands, the purchaser at a sale under the direction of the Court is simply a transferee, there being no provision that he is to be regarded differently.

Under the Land Code there is no equity of redemption, as understood in English law, in the case of charged lands. The chargor, in the form of charge, undertakes to repay the money lent, on a certain day.

In case of default, under section 138, the chargee gives the chargor notice to repay within a time specified (not less than 30 days); and if the chargor does not do so, the chargee may resort to the remedies provided by the Code, one of which is to buy the land himself at the sale under the direction of the Court.

Nor is there any right in the chargee to foreclose, in the sense understood in English law, and the law of those jurisdictions where the Torrens system is in force, in which a statutory right to foreclose exists.

The procedure by sale under the direction of the Court to some extent resembles the statutory foreclosure in other countries, the principle in both cases being that the Chargor's (in the Federated Malay States) or the mortgagor's (in other countries) land shall only pass to the Chargee where he is the purchaser, after reasonable opportunity has been afforded for an adequate price to be obtained from a stranger, by sale of the land by public auction, subject to a reserve price.

As stated by *Kerr* "Australian Lands Titles System" page 435 :—

> "In New Zealand foreclosure has been abolished since the original Conveyancing Ordinance of 1842, but the above-noted provision as to sale by the Registrar of the Supreme Court, at which the mortgagee may purchase, is equivalent to foreclosure."

Certainly, the result is the same, viz., that the Chargor loses all rights to the land which he has charged.

I will now consider what exactly is sold, when the Court orders a sale under section 149. The Chargee calls the proprietor of the charged land before the Court "to show cause why the land subject to the charge should not be sold by public auction under the direction of the Court." If no cause be shown to the satisfaction of the Court, it shall order the public sale of land (the word "the" which appears in the corresponding section of the Fiji Ordinance in front of "land" has been omitted) to take place etc."

The correct interpretation of this seems to me that what is sold is the land subject to the charge; in other words, the purchaser is in the same position as if he had bought the land from the Chargor.

The Court has no power to discharge the charge: the only person who can do so in the case of land held under a Certificate of Title is the Chargee, and at the time of the sale he has not done so. I have already pointed out that in the case of a sale of land held under the Mukim Register, by section 147, the land of the chargor, upon registration of the transfer, passes to and vests in the transferee freed and discharged from all liability on account of the charge; but there is no such provision as regards the transfer of land held under a certificate of title.

I cannot assume this was a mistake on the part of the legislature.

If the original reserve price, or above it, is bid at the sale no difficulty arises. The purchaser pays the money to the Bailiff, one of whose first duties is to pay off the charge, when, presumably, he would have to obtain from the Chargee, a memorandum of discharge stating that the charge had been satisfied and discharged. This memorandum of discharge would be registered, and the transfer to the purchaser, of the land freed from the charge by the act of the chargee would also be registered.

In the case of *Groongal Co.*, v. *Falkiner*, (1924) 35 C.L.R. quoted in "The Transfer of Land" *Wiseman*, 2nd Edition page 274, it was held that the effect of a registration of a discharge of a mortgage is to discharge the personal obligation of the mortgagor under any covenant contained in the memorandum of mortgage. Although I have not access to the report, I have shown that in Australia, a "mortgage" is, in effect, the same as a "charge" under our Land Code.

Where however, the reserve price has been reduced, which is done at the request of the

Chargee, by the officer of the Court, to a figure insufficient to pay off the principal, interest, costs and expenses, and a purchaser, whether he be a stranger or (as in the present case) the Chargee, buys at that price, or at a price still below the original reserve price, upon the land being transferred to him, as transferee, he could by virtue of section 111 only take it subject to liability for the unsatisfied portion of the chargor's debt. In some cases, it might still be worth the purchaser's while to do this; although in the financial depression it would rarely be so.

It is difficult to see what would be the object in reducing the reserve price, if after paying it, a purchaser finds he is still liable to pay the chargee the difference between the reduced and the original reserve prices, so as to cover the whole amount of the chargee's claim against the chargor. If however, the intention of the legislature was that, since there is no express provision in the Code that the Chargee may sue the Chargor for the balance of the loan, after sale to a purchaser (as exists in the Statutes of other jurisdictions where the Torrens system is in force), the Chargee's remedies under the charge are exhausted, it is understandable that a new but lower reserve price should be fixed by the Court, for the protection of the Chargee.

However, in the present case, I am not concerned with the rights or liabilities of a stranger-purchaser, and I need not consider his position. Here, I am dealing with the chargee himself, who has become the transferee of the land subject to the charge, in circumstances very similar to the case of *Fink* v. *Robertson*, (1907) 4 C.L.R. 864 a case under the Victorian Statute, quoted in *Kerr* " Australian Lands Titles System " page 437. It is true that that was a case of foreclosure, which exists in Victoria. It was there held that the entry in the Register Book of the order for foreclosure extinguishes the mortgagee's right to sue on the covenant in the mortgage. As Kerr states on page 435 a sale in New Zealand by the Registrar of the Supreme Court, at which the mortgagee may purchase, is equivalent to foreclosure. With this statement, I agree.

After transfer to the Chargee as purchaser under the Land Code he has an indefeasible title and there is no provision to enable the Court to divest the Chargee.

As the result of the sale, the Chargee has, notwithstanding the entry of " Charges Nil " by the Bailiff, become the transferee of the land subject to the partially satisfied charge and the same consequences follow as if the chargee had taken a transfer from the chargor under section 111 of the Land Code.

Under that section, there is an implied agreement by the transferee so long as the transferee shall remain the proprietor, that he will indemnify the transferor from and against the principal sum interest and other moneys secured by such instrument, and against all liability in respect of the agreements therein contained.

From this section it appears to be obvious that the chargee, when he himself is the transferee, cannot sue the chargor for any balance remaining due to him on the memorandum of charge, after the sale.

The words of Griffith, C. J. in his judgment in *Fink* v. *Robertson (supra)*, quoted by Kerr at page 438, seem to me equally applicable in the present case, viz.:—

> " The further rule that, when property and the benefit of a charge upon it are vested in the same person, the charge is extinguished unless a contrary intention is shown, which may be called a rule of common sense, would dispose of the question. So far from finding any such contrary intention in the Act, to which alone in the absence of express agreement reference must be made, we find an intention plainly expressed in conformity with the general rule."

This passage, to my mind, correctly summarizes the position of a chargee, who, under the Land Code, has become the purchaser of the chargor's land.

Mr. Woods, for the plaintiff, has argued that, as it has been the invariable practice from about 1906, for the Courts in the Federated Malay States to allow a chargee to sue for, and to recover the balance of the Chargor's debt after a sale, this Court should not upset the practice, even if it considers the practice to be illegal.

The present Land Code has only been in existence since December, 1926, less than eight years, which, in my view, is not a sufficient time to suggest that the practice, if wrong, can have any justification.

Section 111 of the Code, in re-enacting the substance of section 32 of the (repealed) Registration of Titles Enactment No. 13 of 1911 (which dealt with transfers) altered the former law, by introducing the chargee as a third party to the agreements implied in cases of transfer, so it is only since 1926 that the present defence could have been raised.

The question of interpreting a statute in a case such as this, was dealt with by Fletcher Moulton, L. J. in *Dean* v. *Brown*, (1909) 2 K.B. 573, 585 where he stated:—

> " The statute we have to construe is not obsolete, but, on the contrary, is in the

fullest and most continuous operation, and in such a case I am not prepared to admit that anything short of a decision which is binding upon it justifies a Court doing otherwise than loyally interpreting the language of a statute to the best of its ability and applying it accordingly. We are here to see that the public have the full benefit of that which the Legislature has enacted, and I cannot admit the existence of any conflicting duty. But if there be cases where the Court is justified in leaning towards not interfering with decisions of old standing, such cases are of a wholly different type to the present case. If under such a decision properties have changed hands, and titles have been accepted without question for a long series of years, or if under its sanction some commercial practice has grown up and become established, a Court will do what it rightly may to avoid the evil and confusion of a change, and may perhaps in its decisions allow itself to be influenced by such considerations if there be an ambiguity which permits the recognized interpretation, even though it would be the less acceptable interpretation were the matter *res integra*. If the decision in *Murtah* v. *Barry* is erroneous, the county courts have for twenty years been deprived of a jurisdiction which the Legislature intended and still intends that they should have, and our plain duty is to put them at once in the enjoyment of it. Our decision will disturb no titles, will create no confusion. What has been done in the past will remain undisturbed; only the future will be affected, and this by restoring the procedure which the statute provides. In such a matter an erroneous decision acquires no sanction from age."

The passage quoted seems to be exactly appropriate to the present case.

My decision will "disturb no titles"; will "create no confusion" and only the future will be affected. If landowners have, since 1911 or earlier, been deprived of their rights and the protection given them by the Legislature, it is my plain duty to see that these rights are restored to them.

Mr. Woods has argued that a judgment for the defendant will cause confusion amongst the mercantile community. I am afraid I cannot regard the money-lenders or investors as representing the public; and to quote Lord Justice Fletcher Moulton in the above case, I am here to see that the public have the full benefit of that which the Legislature has enacted, and I cannot admit the existence of any conflicting duty.

Is the landowner who has lost his land as the result of the chargee obtaining an order for its sale, to be driven to bankruptcy or, if at some future date, he should become possessed of money as the result of rehabilitating himself by industry, is he to be stripped by the chargee, when, as I interpret the Land Code, this was not the intention of the Legislature?

The present state of affairs is the result of the world depression and is not the fault of the landowners; and yet I am asked to hold that, simply because he has done so in the past, the moneylender or investor is to come out of his transaction with the landowner, scatheless, after having enjoyed a high rate of interest on his capital, and obtained the land, which, at the time he lent the money, he, presumably, regarded as an ample security. He was not obliged to lend the money, but did so for his own benefit, and with the accompanying risks.

I give judgment for the defendant with costs.

The plaintiff appealed. The appeal was heard on March 12, 13 and May 2, 1935.

SIR SAMUEL THOMAS, C.J.—John Edgar Jones, the appellant, sued P. L. S. K. R. Palaniappa Chetty, the respondent, for moneys which he claimed to be due to him in respect of a loan transaction secured by a charge.

The suit was heard before Howes, J., and dismissed. The appellant appeals from that dismissal.

On the 23rd of May, 1931, the respondent had executed a memorandum of charge in favour of the appellant in the form contained in Schedule XXIV (a) of the Land Code 1926. This charge set out that the respondent was the registered proprietor of certain lands, and in consideration of the sum of $25,000 lent to him by the appellant, he agreed firstly to repay that sum on the 23rd day of November, 1931, secondly to pay interest at the rate of $9.60 per centum per annum, and thirdly in the event of default of the payment of interest, the principal and any interest due would immediately become due and payable on demand. Then followed the words:—

> "And for the better securing to the said chargee the repayment in manner aforesaid of the principal sum and interest I hereby charge the land above described with such principal sum and interest and subject to the aforesaid the said chargee shall be entitled to all the powers and remedies given to a chargee by the Land Code 1926."

Default having been made by the respondent, notice was duly given under section 138 of the Land Code. Subsequently on the appellant's application an order was made by Thorne, Ag. C.J. on the 22nd of August, 1932, for the sale of the chargor's full interest and for the nett proceeds of that sale to be applied towards the payment of the principal sum of $25,000 and interest. That sale proved to be abortive, and on the 27th of October, 1933, an order was made by the Assistant Registrar of the Supreme Court at Ipoh that the sale of the chargor's interest be proceeded with, and that it should be sold free from encumbrances at a reduced reserve price of $9,600. By the same order the appellant was given leave to bid at the sale, and to set off the purchase price against the amount due to him.

The present respondent appealed from the order of the Registrar. The appeal was heard before Mudie, J. and dismissed. In accordance with the Registrar's order the second sale took place on the 27th of December, 1933; then the land was bought by the appellant for the sum of $9,610.

After allowing for this purchase price and certain sums due and paid in respect of interest and for certain rents which had been collected, there remained the sum of $20,952.42 not received by the appellant. It was in respect of this amount that the plaintiff sued.

The respondent by his defence pleaded that the charged land having been sold at the instance of the appellant as chargee, the charge had ceased to exist, and on that account the covenant as to the payment of the principal and interest had also ceased to operate, and also that the land had been purchased by the appellant freed and discharged from all liability on account of the said charge, and that on that account the appellant was not entitled to maintain his suit.

In the course of his judgment the learned trial Judge said:

> "After transfer to the chargee as purchaser under the Land Code he has an indefeasible title; and there is no provision to enable the Court to divest the chargee. As the result of the sale, the chargee has, notwithstanding the entry of 'charges nil' by the bailiff, become the transferee of the land subject to the partially satisfied charge, and the same consequences follow as if the chargee had taken a transfer from the chargor under section 111 of the Land Code. Under that section, there is an implied agreement by the transferee so long as the transferee shall remain the proprietor, that he will indemnify the transferor from and against the principal sum interest and other moneys secured by such instrument, and against all liability in respect of the agreements therein contained.
>
> From this section it appears to be obvious that the chargee, when he himself is the transferee, cannot sue the chargor for any balance remaining due to him on the memorandum of charge, after the sale."

The question before the Court can be stated shortly as follows. When on a sale of charged lands by public auction under an order of the Court the chargee buys in at a price less than the sums due in respect of the money lent, interest etc., has the chargee any right to recover the unpaid balance from the chargor, or is the debt extinguished by the purchase of the charged lands?

In the course of the argument references were made to English mortgages, and to cases decided in respect of the Land Code in Australia. The case of *Fink* v. *Robertson*, (1907) 4 C.L.R. 864, was especially emphasized on behalf of the respondent. In my opinion, however, it is of little use to consider the law relating to other countries, unless it can be shown to be identical with the law existing here. In this connection it must be remembered that there is nothing corresponding to an English mortgage in the Federated Malay States, and even if the Australian Land Act may be in some respects similar to the Land Code of the Federated Malay States, it must not be forgotten that in the case of *Fink* v. *Robertson* (*supra*) regard was had to the law, as it existed prior to the passing of the Australian Land Act. For such reasons cases decided in other countries may not only be of little service, but may even possibly be misleading.

In the Federated Malay States the Land Code makes provision for charges. These are dealt with in Part X. The first few words of section 129 which commence this chapter are noticeable. They are:—"whenever any land is intended to be charged or made security." There is no definition of a charge in the Enactment. But from the words just cited and also from the words 'for the better securing' contained in Schedule XXIV (a) it would seem that it was the intention of the legislature that the rights of a chargee should not be limited to the land itself.

Under section 129 provision is made for the registration of a charge against the title to the land charged, and under section 130 provision is made for the registration of a discharge, either partial or total. This section obviously contemplates a discharge between the parties themselves without the intervention of a Court. When, however, there has been a default, provision is made in section 138 for the steps to be taken.

These consist of a notice to pay off within a specified time all the moneys due and owing on the charge, and of a notification that the chargee will resort to all remedies competent unless the default is remedied. When the default is not remedied after notice, another series of provisions apply. These vary according to whether the land (1) is held under entry in the Mukim Register or (2) is held under grant, lease of State land or certificate of title.

The land the subject of the charge was held under certificate of title, therefore recourse was had to the assistance of the Court. Under section 149 the proprietor of the charged land is summoned before the Court to show cause why the land subject to the charge should not be sold by public auction under the direction of the Court. When no cause is shown to the satisfaction of the Court, the land is ordered to be sold by public auction.

It seems to be quite clear that the words 'land subject to the charge' used in this section are intended only to describe the land and not to suggest that the land should be sold subject to the charge. In the second paragraph of the section the words are 'it shall order the public sale of land to take place.' The description words 'subject to the charge' are not used here. If it had been intended that the land should be sold subject to the charge, it would have been expected that the words 'subject to the charge' would have been repeated in this place.

The sale is subject to the direction of the Court. The particulars with the exception of the place and time are settled by the Registrar. A reserve price is placed on the land. Formerly this was either the improved value of the land or the estimated approximate value of the land; but now it is the amount of the principal and interest due under the charge—(section 150 as amended by section 20 of Enactment No. 31/1928). This makes it clear that in the first instance the land is being sold at a price at least sufficient to pay off the money secured by the charge in respect of which the sale is ordered. But when no bid at least equivalent to the reserve price is made, then the sale is adjourned, and the land may be put up again at the same or at a reduced reserve price—(section 153).

It will be convenient hereafter to refer to the chargee at whose instance the sale is ordered as the selling chargee.

It has been argued that the sale is subject to the charge of the selling chargee as well as all prior charges, or in other words, that a purchaser assumes all these charges on the land. Assuming for the sake of argument that such is the case, then in the event of a sale to a stranger at the first auction at the full reserve price, the selling chargee might get nothing save a transfer of charge, since the price realised has to be dealt with in accordance with the provisions contained in section 154. Instead of concluding the matter, whether beneficially to himself or not, he would have to start all over again if he still desired to try and enforce his security. The selling chargee is entitled to bid at the auction (section 152). Should he prove a buyer it would seem that his own charge would be extinguished, even though the value of the land might be small compared with the money lent.

Such extraordinary results can hardly have been contemplated by the legislature. Moreover, the language of the Enactment is clear. Section 149 provides that:—

> "If no cause be shown to the satisfaction of the Court, it shall order the public sale of the land."

The sale is to be under the direction of the Court, and the power of the Court is unfettered, save that the sale is to be by public auction, and in the first instance an attempt has to be made to secure the amount of the charge of the selling chargee.

It might be argued that having regard to the words previously used in section 149 the land which is ordered to be sold is the land subject to the charge, i.e. the land in its condition at the time it is charged to the selling chargee, or in other words the land subject to any other existing charges.

Such a contention would hardly seem to be permissible in view of the provisions of section 154, which provides a scheme of ranking, unless the words 'first charge' therein contained are intended to refer to the first charge after the charges existing at the time the land was charged to the selling chargee.

It is unnecessary to decide this question for the purposes of the present case, since there were no charges prior to that of the selling chargee. Apart from any such interpretation there is no provision in the Enactment that the sale shall be subject to any charge whatever; it is the land itself that the Court is empowered to sell; in the absence of any special direction as to charges the land is sold without regard to them.

In the directions the sale may of course be made subject to certain charges, or it may be emphasized that certain charges are excluded. In the present case the sale was stated to be free from encumbrances. In my view such an order was not necessary, since I am of the opinion that when no reference to encumbrances is made, the sale is free from encumbrances.

On a sale taking place the officer of the Court gives a certificate that the land has been sold by auction under authority of the Land Code. That

certificate is in the form in Schedule XXXIV. It contains at the end the following words:

> "Now I do hereby transfer the said land to the said A.B. subject to the annual rent and charges hereunder written."

If the sale were automatically subject to the charges upon the land, then it would seem unnecesssary to add those words. But the sale is only subject to such charges as the Court may direct, and therefore those words become necessary.

In the present case a certificate was given in the form in Schedule XXXIV, and therein there was entered under the heading 'leases, charges or other registered interest (if any)' the word 'nil.'

There is no suggestion in the Enactment that, in a sale by the order of the Court, any document of partial or total discharge should be registered. The position is that an unpaid creditor has realized the security given in respect of the debt, and that the unpaid portion of the debt can be recovered by having resort to other remedies.

I conclude that the contention raised on behalf of the respondent cannot be sustained, and that this appeal must be allowed. The judgment of the trial Judge is set aside. In that the sums claimed were not questioned, judgment is ordered to be entered in favour of the plaintiff for the sum of $20,952.42 and interest at the rate of 9.6 per cent per annum from the 28th of December, 1933 until the 20th of October, 1934, and costs, and interest at 8 per cent per annum on the decretal amount from the 21st of October, 1934 until the date of satisfaction. The appellant will have the costs of the appeal.

SIR WALTER HUGGARD, C.J. (STRAITS SETTLEMENTS)—In this suit the appellant sued the respondent for a sum of $20,952.42, with interest thereon, alleged to be due in the following circumstances.

On the 23rd May, 1931, the respondent borrowed from the appellant a sum of $25,000 and, to secure the repayment of that amount, he executed in the appellant's favour a document called in the Land Code a Memorandum of Charge (Schedule XXIV (a)). By this document the respondent agreed:—

(1) that he would pay to the chargee (i.e. the appellant) the sum of $25,000 on the 23rd November, 1931;
(2) that he would pay interest on that sum at the rate of $9.60 per cent per annum;
(3) that if he made default in payment of interest the principal and interest then due would be immediately become due;

and the document then proceeds as follows:—

> "And for the better securing to the said chargee the repayment in manner aforesaid of the principal sum and interest I hereby charge the land above described with such principal sum and interest and subject to the aforesaid the said chargee shall be entitled to all the powers and remedies given to a chargee by the Land Code, 1926."

The respondent having made default in the payment of interest, the appellant applied to the Court in August, 1932, for an order of sale of the lands under section 149 of the Land Code, and on the 22nd of that month it was ordered by Thorne, Acting Chief Justice, that the respondent's full interest in the land be sold by public auction under the direction of the Court and that the nett proceeds of such sale be applied towards payment of the principal sum of $25,000 and interest thereon.

The land was put up for sale in due course but two sales proved to be abortive, the reserve price not being reached. In these circumstances the appellant applied for and obtained from the Registrar an order under section 153 of the Land Code, dated the 27th October, 1933, whereby it was ordered that the sale of the respondent's interest in the land be proceeded with and that the same be sold free from encumbrances by public auction at a reduced reserve price of $9,600. It was also ordered that the appellant be at liberty to bid and buy in the land and to set off the purchase price thereof against the amount due to him under the charge.

The respondent appealed against this order so far as it related to the reduction of the reserve price, but his appeal was dismissed by Mudie, J. on the 6th November, 1933.

In pursuance of the Registrar's order of the 27th October the land was therefore put up for sale again on the 27th December and was bought in by the appellant for the sum of $9,610.

On the 23rd January, 1934, the Bailiff executed a Certificate of Transfer as required by section 152 of the Land Code (Schedule XXXIV) transferring the land to the appellant "subject to the annual rent and leases, charges or other registered interests hereunder written". At the foot of the document the leases, charges or other registered interests are shown as "Nil".

On the 24th January the appellant executed a Memorandum of Discharge as required by section 130 of the Land Code (Schedule XXV(a)) in which he acknowledged the receipt of $9,610 in partial satisfaction and discharge of the charge.

On the 27th January the appellant was registered as proprietor of the land free of the charge.

After setting off against the original debt of $25,000 the purchase price of $9,610 and the amount of certain rents and profits collected by the appellant there remained still unpaid by the respondent the sum of $20,952.42 and in April, 1934, the appellant sued the respondent for this amount.

The point for decision was whether the appellant, having exhausted his remedies under the Land Code, could now maintain a claim for the balance still remaining unpaid, or whether the balance of the debt had been extinguished.

In his Statement of Defence the respondent pleaded that the land having been sold at the instance of the appellant as chargee, the charge had ceased to exist and therefore the covenant to pay the principal and interest had also ceased to operate. It was further contended that the land having been purchased by the appellant freed and discharged from all liability on account of the charge the appellant was not entitled to maintain the suit.

In the Court below the learned trial Judge upheld the contention of the respondent and dismissed the claim. The consideration which influenced the learned Judge in arriving at this decision may, I think, be gathered from the following brief extracts from his long and careful judgment:—

> "What is then the position of a purchaser who buys the land at a price below the original reserve price, and therefore not sufficient to satisfy the claim of the chargee, whether the purchaser be a stranger or, as in the present case, the chargee himself?
>
> Has he bought the land subject to the partially satisfied charge, as the form of Certificate of Transfer would indicate, and thereby as a transferee, under section 111, taken over the obligations of the chargor?"
>
> .....
>
> "I will now consider what is sold, when the Court orders a sale under section 149. The chargee calls the proprietor of the charged land before the Court to show cause why the land subject to the charge should not be sold by public auction under the direction of the Court. If no cause is shown to the satisfaction of the Court, it shall order the public sale of (the) land .....to take place, etc.
>
> The correct interpretation of this seems to me that what is sold is the land subject to the charge; in other words, the purchaser is in the same position as if he had bought the land from the chargor"
>
> "As the result of the sale, the chargee has, notwithstanding the entry of "Charges Nil" by the Bailiff, become the transferee of the land subject to the partially satisfied charge, and the same consequences follow as if the chargee had taken a transfer from the chargor under section 111 of the Land Code.
>
> Under that section there is an implied agreement by the transferee, so long as the transferee shall remain the proprietor, that he will indemnify the transferor from and against the principal sum, interest and other moneys secured by such instrument, and against all liability in respect of the agreement therein contained.
>
> From this section it appears to be obvious that the chargee, when he is himself the transferee, cannot sue the chargor for any balance remaining due to him on the memorandum of charge after the sale."

It is apparent from the above observations that the learned trial Judge's ultimate conclusion was mainly influenced by the interpretation which he placed upon section 149 and the consequent application of section 111. With respect, however, I find it quite impossible to agree that under the terms of section 149, when land is sold in pursuance of an order under that section, the land is sold subject to the charge. In my opinion, the words "subject to the charge" are merely descriptive of the land to be sold and are not intended to indicate that the charged land is to be sold subject to the charge.

I am also unable to agree that section 111 of the Code has any application where charged land is sold in pursuance of an order under section 149. In my opinion section 111 applies to a transfer *inter partes* and not to a transfer in pursuance of an order of Court. This appears to be sufficiently clear from the terms of section 111 itself which provides that, where land subject to a charge is transferred, there shall be implied an agreement by the transferee with the transferor that he will indemnify and keep harmless the transferor from and against all liability in respect of the charge. In the case of a sale under order of Court the actual transferor is not the proprietor but an officer of the Court (vide section 152), and it is difficult to see why the law should imply an agreement on the part of the transferee to indemnify and keep harmless an officer of the Court from and against a liability which he had never incurred. The inference therefore is that section 111 was never intended to apply to transfers under orders of Court. Mr. Goho for the respondent attempted to get over this difficulty by suggesting that the officer of

the Court, in executing a Certificate of Transfer under section 152, acts as agent of the chargor and that therefore the Certificate should be treated as a transfer under section 111. But in executing a Certificate of Transfer under section 152 the officer of the Court is performing a duty imposed on him by law, and in so doing cannot, in my opinion, by any stretch of imagination, be regarded as the agent of the chargor.

The learned trial Judge appears to have been impressed also by the form of Certificate of Transfer given in Schedule XXXIV which was used in this case and which states that the land is transferred "subject to the annual rent and charges hereunder written". In the course of his judgment he observes:—

> "By what authority the Bailiff recorded on the certificate of transfer on the 23rd January, 1934, 'Charges (if any) Nil,' I do not know. At that date the charge had only been satisfied as to $9,610; so that the greater portion of it remained unsatisfied, and the land could only be transferred subject to the unsatisfied portion of the charge".

As regards this observation I think, in the first place, it is clear that the charges which are intended to be recorded in the Certificate of Transfer are charges other than the charge in respect of which the sale has taken place. This view appears to find support if reference is made to the Form given in Schedule XXXIII. That is the Form of transfer prescribed for use on a sale, at the instance of a chargee, of land held under Entry in the Mukim Register, and it contains the same words as in Schedule XXXIV, namely, "subject to the annual rent and charges hereunder written." On such a sale, however, it is provided by section 147 that the land shall pass to and vest in the transferee freed and discharged from all liability on account of the charge in satisfaction whereof the land has been sold, so that it is obvious that the charges required to be recorded in Schedule XXXIII are charges (if any) other than that in respect of which the land has been sold. It is difficult to conceive that the same words in Schedule XXXIV have an entirely different meaning, and in my opinion the charges required to be recorded in both Forms are such prior charges as are referred to in section 140 of the code. This section reads:—

> "Where a second or subsequent charge has been registered the provisions of this Part shall apply to such second or subsequent charges, but the sale shall be expressed to be subject to all prior charges."

This section may have escaped the notice of the learned trial Judge since he does not mention it in his judgment. In the present case there were no prior charges on the land in question so that the Bailiff's entry—"Charges Nil"—was in accordance with the facts. In the second place, the learned trial Judge questions the authority by which the Bailiff recorded—"Charges Nil"—on the Certificate of Transfer. The authority is, of course, to be found in the order of the Registrar dated the 27th October, 1933, which has already been mentioned and which directed that the chargor's interest in the land should be sold free from encumbrances. This order had been confirmed by Mudie, J. The Bailiff therefore had no other course open to him but to act in accordance with that order. Mr. Goho suggested that the order of the Registrar was made without jurisdiction and therefore that he was entitled to regard it as a nullity. But in the view I take of the matter the order of the Registrar was one which he had jurisdiction to make and was, in all the circumstances of the present case, a correct order.

Another argument put forward by Mr. Goho, in support of his contention that land sold under section 152 is sold subject to the charge, is based on the omission from the Land Code of a section corresponding to section 53 of the Registration of Titles Enactment, No. 13 of 1911. That section was to the effect that:—

> "When land has been sold by the Court, the sale shall be final, and it shall not be lawful for any person to challenge or impugn the same on any ground whatever, and the bidder in whose favour the certificate has been issued and registered shall be the absolute owner of the land so sold, as fully and completely as if he had been the original grantee of the said land."

It is, of course, true that the Land Code contains no section in precisely similar terms, but section 152 provides that the Bailiff's Certificate of Transfer may be presented to the Registrar "who shall receive the said certificate in all respects as a valid transfer of the land therein mentioned and shall register the same." It appears to me that this provision when read in conjunction with sections 96 and 42 (1) of the Code confers upon the transferee an indefeasible title and renders unnecessary an express provision in the terms of section 53 of the Registration of Titles Enactment. No inference can therefore, in my opinion, be drawn from the omission from the Land Code of such an express provision.

A still further argument was based upon the terms of section 147 of the Code which relates to land held under Entry in the Mukim Register and provides that upon registration of a memorandum of transfer by the Collector the land of the

chargor shall pass to and vest in the transferee "freed and discharged from all liability on account of the charge in satisfaction whereof the land has been sold." Section 152 on the other hand contains no such words, and it is argued from this that where land held under Certificate of Title is transferred under the latter section it is transferred subject to the charge. The mind of the learned trial Judge was clearly influenced in favour of the Respondent's contention by this argument, as he observes :—

> "I have already pointed out that in the case of a sale of land held under the Mukim Register, by section 147, the land of the chargor, upon registration of the transfer, passes to and vests in the transferee freed and discharged from all liability on account of the charge; but there is no such provision as regards the transfer of land held under a Certificate of Title. I cannot assume this was a mistake on the part of the Legislature."

I agree with the learned Judge that one is not entitled to assume a mistake on the part of the Legislature, but, with respect, I do not agree that the omission of the words referred to from section 152 justifies the inference that the Legislature intended that transfers under that section should be subject to the charge. If that had been the intention I shall have expected it to be expressly stated. It seems to me that a reasonable explanation of the omission is that all sales under section 152 are in pursuance of orders of Court, and therefore it is left to the Court to give directions in each case as to the conditions under which the land is to be sold. In the case of sales of land held under Entry in the Mukim Register, however, the Court is not in any way concerned: the whole proceedings are conducted by the Collector and therefore it is desirable that the conditions under which such sales take place should be clearly declared. Further, although section 152 does not expressly state, as does section 147, that the land shall vest in the transferee free from liability on account of the charge, it seems to me that the intention may properly be inferred, because the section provides that the Bailiff shall deliver to the purchaser not only the Certificate of Transfer but also the issue document of title to the land sold. If it was intended that land sold under section 152 should be sold subject to the charge, then clearly the issue document of title should remain with the chargee and should not be delivered to the purchaser.

I am of opinion, therefore, that when land is sold under section 152 of the Code, in pursuance of an order of Court, the purchaser, whether he be the chargee or a stranger, takes the land freed and discharged from all liability on account of the charge in respect of which the sale has been ordered. In the present case what was sold was the chargor's full interest in the land in question, free from encumbrances. I am satisfied that in the circumstances here the sale was effected in accordance with the intention of the Ordinance.

This being so, is the appellant now entitled to recover from the respondent the balance of the money borrowed by him ?

If one looks at the Memorandum of Charge which was signed by the respondent, it clearly amounts to a definite undertaking to repay to the appellant the sum of $25,000 with interest, and as I have already pointed out, it goes on to say that for the better securing the repayment of the principal sum and interest the respondent charges his land. The Memorandum on its face is primarily a promise to repay the amount borrowed, and for "better securing" the fulfilment of that promise it creates a charge upon the land. I respectfully agree with the words of Woodward, C.J.C., in *S. R. M. M. A. Supramanian Chetty* v. *S. P. Mohamed Ibrahim*, 3 F.M.S.L.R. 91 at page 96, where he says :—

> "The borrower covenanted to repay. and the charge upon the land is subsidiary and ancillary to the covenant."

Unless, therefore, there is something in the Land Code which indicates that in a case such as this, when the security has been realized, the balance (if any) of the debt is extinguished, it is clear that the obligation of the chargor can only be discharged by payment in full of the amount borrowed with interest. I cannot find any such indication in the Land Code. On the contrary, it appears to me that the inference to be drawn from certain provisions of the Code is that the Legislature could not have intended to deprive a chargee of land held under Certificate of Title, who had realized his security, of his right to sue for the balance. For example, in the case of land held under Entry in the Mukim Register it is clear from the provisions of section 148 that a chargee, after having had recourse to his remedies under the Code, may sue for the balance (if any) still due. Under that section a chargee must first pursue his remedies under the Code but he can then sue for the balance. The Legislature can hardly have intended to place chargees of land held under a Certificate of Title in a worse position than chargees of land held under Entry in the Mukim Register. Then, again, when a lien has been created under section 134 of the Code the lien-holder may obtain a judgment for actual sum due and may then obtain forthwith

an order for the sale of the land. If the sale fails to realize the full amount due, the lien-holder still has his judgment to fall back upon and he can execute for the balance. It follows from this that if the respondent's contention were to be accepted it would mean that the holder of a lien is in a better position than a chargee. In the absence of a specific provision to that effect I am not prepared to attribute any such intention to the Legislature.

And if we turn to the Bankruptcy Enactment (No. 2 of 1912), section 9 (ii) and paragraphs 9 and 20 of the Third Schedule, we find it expressly provided that a secured creditor may realize his security and then prove for the balance or deficiency. Here again it is difficult to conceive that the Legislature could have intended to place a solvent chargor in a better position than an insolvent chargor.

In England where a mortgagee realizes his security he is entitled to sue on the personal covenant for any balance due. There are, of course, certain essential differences between an English mortgage and a charge under the Land Code of the Federated Malay States, but where in either case the security has been realized in pursuance of an order of Court and there remains a deficiency I can see no reason for distinguishing between the subsequent rights of a mortgagee in England and those of a chargee in the Federated Malay States. In *Gordon Grant & Co., Ltd.* v. *Boos*, (1926) A.C. 781 the Judicial Committee of the Privy Council held that a mortgagee who has obtained an order for sale, and, bidding with the leave of the Court, has purchased the mortgaged property, is not precluded from suing the mortgagor upon his personal covenant in the mortgage for the difference between the sum due under the mortgage and that realized by the sale. The following are extracts from the judgment of their Lordships (at pages 786-787):—

> "But, if the mortgagee does not use the remedy of foreclosure but sells under a power of sale given to him by the mortgage deed and brings into account the whole sum thus received and then proceeds to sue his debtor for the balance and the balance only, there is no question of double payment, and there would seem to be no reason in principle why he should not recover the balance.
>
> .....
>
> Now, if instead of the mortgagee exercising a power of sale given to him in the deed, he, when he brings an action to enforce his security, asks the Court for a sale instead of a foreclosure, why should not the same principle apply? The sale ascertains the value of the property, the mortgagee gets no more from the property, than what the sale brings to him. If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is *pro tanto* unpaid and should be allowed to sue on the personal covenant."

In my view these principles are equally applicable to a sale in pursuance of an order under section 149 of the Land Code, and I cannot see anything in the Code itself or any reason in principle why, in such a case as the present one, the chargee should not be entitled to sue for the balance of the debt which remains unpaid.

I therefore concur in the order proposed by the learned President of the Court.

TERRELL, J.—In May, 1931, the respondent borrowed from the appellant $25,000 and as security therefor executed a Memorandum of Charge in Form XXIV (a) in the Schedule to the Land Code, 1926. By this Memorandum the respondent agreed (1) to repay the $25,000 on the 23rd November 1931;

(2) to pay interest monthly at the rate specified;

(3) that if default were made in payment of the interest, the principal and interest then due should immediately become payable;

and (4) "for the better securing to the said chargee the repayment in manner aforesaid of the principal and interest" the respondent charged the land therein described with such principal sum and interest and it was provided that the chargee should be entitled to all the powers and remedies given to a chargee by the Land Code 1926.

The form of the Memorandum accordingly places the promise to pay principal and interest first and only afterwards refers to the land which is charged for the purpose of giving the chargee a better security, i.e. a security better than the mere personal promise to pay.

There is no evidence whether the land included in the security and which was held under Certificate of Title, was or was not worth $25,000 at the time that the charge was effected but it is quite possible to imagine a case in which a chargee lent money relying principally on the chargor's personal security, the actual value of the land bearing little relation to the amount borrowed.

The respondent soon got into arrears with his interest and the appellant applied for an order of sale under section 149 of the Land Code, and on the 22nd August, 1932, Thorne, J., acting Chief Justice, made an order that "the chargor's

full interest" in the land charged be sold by public auction under the direction of the Court and that the nett proceeds of such sale be applied towards payment of the principal sum of $25,000 and the interest thereon.

The reserve price, which under section 150 (ii) was the full amount of the principal, interest and costs, was not reached. Under the provisions of section 153 application was made to put up the property again at a lower reserve, and on the 27th October, 1933, an order was made by Mr. Registrar Bradley that "the chargor's interest in the land" be sold free from incumbrances at the reduced reserve price of $9,600. It was also ordered that the appellant—the chargee—be allowed to bid and to set off the purchase price thereof against the amount due to him on the charge. The respondent appealed against the reserved price being reduced to $9,600 but on no other ground. The appeal was heard before Mudie, J. on the 6th November, 1933, and was dismissed. The result of this was that there was the Registrar's order (1) for sale free of incumbrances and (2) providing that the purchase price should be set off against the amount due to the chargee, and this order had been confirmed by the Judge. The order giving leave to the chargee to bid was clearly unnecessary in view of section 152 of the Code, and the only effect of it was to emphasize that even if the chargee bought, the purchase price would reduce the amount due to him by virtue of the charge.

In pursuance of that order the chargee became the purchaser of the land on the 27th December, 1933. Presumably he paid the purchase price $9,610 to the auctioneers who passed it on to the Assistant Registrar of the Court who paid it to the appellant. The appellant thereupon executed a memorandum of partial discharge of the charge (Form XXV (a)) in pursuance of section 130 of the Land Code. The memorandum is dated the 24th January, 1934, and the memorial was registered in the Registry of Titles on the 27th January, 1934. In accordance with the provisions of the Code the memorial was on the same day indorsed on the issue copy of the Certificate of Title and registered as presentation No. 288/34.

On the same day the certificate of the bailiff in the form of Schedule XXXIV was also registered as presentation No. 289/34. The certificate which stated that the appellant was the purchaser at the sum of $9,610, purported to transfer the land to the appellant subject, *inter alia*, 'to the charges hereunder written,' the charges being specified as 'nil'. This certificate was of course strictly in accordance with the order of the Registrar which had been confirmed by the Judge, and section 152 of the Land Code provides that the certificate may be presented together with the issue document of title to the Registrar of Titles "who shall receive the said certificate in all respects as a valid transfer of the land therein mentioned and shall register the same."

At this stage it will be useful to examine the allegations in the defence. The respondent alleges first in par. 2 that the charge had ceased to exist because the land was sold at the instance of the plaintiff as chargee. I take this to mean that the land having as a result of the sale become vested in a purchaser free of the charge, the charge is at an end and the promise to pay principal and interest is also at an end. Secondly in par. 3 the respondent alleges that the charge is at an end because the chargee was the purchaser. This could only result if the chargee, as purchaser, purchased subject to the charge in which case the obligation to pay and the benefit of the charge would both have become vested in the appellant, and no further action would lie on the promise to pay in the original charge.

In opening his case before the learned trial Judge Mr. Goho attempted to support both these propositions although it is clear that they are entirely inconsistent. Either the land is sold subject to the charge or it is not. If after transfer the charge remains, it clearly cannot be argued that the chargor cannot be sued because the charge disappeared on the transfer to a purchaser free of the charge.

The learned trial Judge accepted the argument based on par. 3 of the defence, and in the Court of Appeal Mr. Goho adopted this point of view to the exclusion of the other. The finding of the learned trial Judge and the submissions of the respondent in the Court of Appeal therefore make it unnecessary to consider any argument based on par. 2 of the defence. The position taken up by the respondent is that the order of the Registrar of the 27th October, 1933 was a nullity and accordingly that the order of Mudie, J. confirming it was also a nullity. Similarly that the certificate of the bailiff was made without authority and that the registration of the appellant as proprietor free of the charge was wrongly made.

Now on the subject of the bailiff's certificate the learned trial Judge says:

"By what authority the bailiff recorded on the certificate of transfer on the 23rd January, 1934, 'charges (if any) Nil' I do not know. At that date, the charge had only been satisfied as to $9,610.00 so that the greater portion of it remained unsatisfied, and the land could only be transferred subject to the unsatisfied portion of the charge."

In view of the order made by Mr. Registrar Bradley which had been duly confirmed on appeal, and with all respect to the learned trial Judge, I fail to see what the Bailiff could have done except to sign a certificate in the form in which he did sign it. It was certainly not for him to question the jurisdiction to make the order and it was his duty to act in pursuance of such order. Similarly the Registrar of Titles was compelled to register a memorial in strict accordance with the certificate which had been presented.

It follows, I think, that the registration of the memorial, presentation No. 289/34, flows naturally and legally from the original order of Mr. Registrar Bradley and such order can only be treated as a nullity if it was made without jurisdiction (see *Toronto Railway* v. *Toronto Corporation*, (1904) A.C. 809). This case appears to show that if the order was in fact made without jurisdiction the respondent would not be bound as a matter of *res judicata* either by that order or by the order of Mudie, J. confirming it, or by the subsequent administration acts implementing it. If, however, the order was properly made it follows that the respondent's argument falls to the ground and that the appellant must succeed The substance of the case, therefore, is whether the order of the Registrar was right and this depends on whether it is the intention of the Land Code that when land is sold at the instance of the chargee such land should vest in the purchaser free of charge. If that is the position, the appellant has not argued that the original charge is wiped out. Accordingly if the original promise to pay has been only partially satisfied the chargor is *prima facie* still liable for the balance.

Now, a charge under the Land Code bears certain superficial resemblances to a mortgage in England in that it contains a promise to pay and makes the land a security for the debt, but there are essential differences. Whereas in England the estate is transferred to the mortgagee leaving the mortgagor a bare equity of redemption, under the Land Code the estate remains in the chargor who is regarded as the proprietor (see the Definition in section 2). In my opinion the chief fallacy of the respondent's argument was that he spoke of the chargor's interest as an equity of redemption. If he had a mere equity and 'his interest' were sold, there would be good ground for arguing that his interest was being sold subject to the charge. But that is not the position—his full interest is his interest as proprietor of the land comprised in the Certificate of Title; when such interest is directed to be sold, it is the land itself and not the residue, if any, remaining after the charge is satisfied. This I think is made perfectly clear by the wording of section 149 which provides that the proprietor shall show cause why "the land subject to the charge should not be sold." I regret that I cannot agree with the learned trial Judge that this means that the land shall be sold subject to the charge. It appears to me that the words "subject to the charge" cannot be transposed in this way without doing violence to the plain and ordinary meaning which should be attributed to the words. In my opinion the words "the land subject to the charge" are purely descriptive, and can have no possible reference to the estate which a purchaser shall take after the sale has been completed.

The Land Code should, of course, be interpreted as a whole and if section 149 and the subsequent sections are not sufficiently explicit, it is permissible to consider other provisions of the Enactment with a view to arriving at a consistent interpretation for the whole Code. It is, I think, also permissible to consider the rights accorded to chargees under the Bankruptcy Enactment. Under section 9 (ii) of that Enactment if a receiving order is made against the chargor it shall not affect the power of any secured creditor to realize his security "in the same manner as he would have been entitled to realize or deal with it if this section had not been passed," and in par. 9 of the Third Schedule to the Enactment "Proof by secured creditor," it is provided that if a secured creditor realizes his security he may prove for the balance due to him after deducting the amount realized.

Again, if a lender instead of obtaining a registered charge is satisfied with a lien which he has implemented by means of a caveat under section 134 he can enforce his security by obtaining a judgment for the money and then obtaining an order for the sale of the land. It is clear in that case that the judgment will only be satisfied to the extent to which it is reduced by the amount realized on sale.

If accordingly the respondent's argument is correct, a lender is in a worse position if he has a registered charge than he would be if he merely had a lien or if the chargor happened to go bankrupt. I am satisfied that no such inconsistent intention should be imputed to the Legislature without the clearest possible expression.

The procedure for reducing the reserve price set out in section 153 is also very significant. As stated above, the first reserve price under section 150 has to be the total amount owing for principal, interest and costs. If no sale is effected the reserve price may be reduced as it was in this case. According to the respondent's argument, therefore, a purchaser at the original auction

would have to pay at least the whole amount due, such amount being set off under section 154 against the amount of the charge which would presumably be discharged. If no purchaser is found, then the reserve price can be reduced. If, however, a purchaser at the reduced price is found he is, according to the finding of the learned trial Judge, still liable for the balance of the debt and in substance the reserve price has not been reduced at all.

Again, if the respondent is correct in arguing that it is only the chargor's interest subject to the charge which is put up for sale, there is no logical ground for holding that such interest is only subject to any particular charge. If, as Mr. Goho argues, the chargor's interest in the land must be treated as meaning his equity of redemption, such interest can only mean what is left to him after satisfaction of the principal and all subsequent charges.

The effect of this, therefore, would be to enable the chargor by giving subsequent charges to reduce the value of the original chargee's security, as it is obvious that the introduction of subsequent charges and the consequent increase in a purchaser's liability could only have the effect of reducing the likelihood of finding a purchaser at all. I feel quite unable to accept a construction which would render the special provisions for reducing the reserve price a farce and would enable a chargor without reference to the chargee to reduce the chargee's security.

A further indication that the Land Code contemplates that the land shall be sold free of the charge, is provided by section 152. This directs the bailiff to deliver the certificate and the issue document of title to the purchaser. If the land has been sold subject to the charge the issue document of title should be handed back to the chargee. The purchaser is only entitled to the document of title if there is no charge.

There is, however, one argument that requires further consideration and that is the absence from the Land Code of any provision corresponding to section 53 of the Registration of Titles Enactment No. 13 of 1911. Although section 152 of the Land Code corresponds closely with section 50 of the earlier Enactment, section 53 of the Registration of Titles Enactment specifically says that the sale is to be final and not impugned on any ground whatever and that the person in whose favour the certificate of the officer of the Court has been issued and registered shall be the absolute owner as fully and completely as if he had been the original grantee. Attention has also been called to section 147 (1) of the Land Code which deals with the sale by the Collector of charged land held under entry in the Mukim Register. This section provides as follows:—

> "Upon the registration of any memorandum of transfer by the Collector as aforesaid the land of the chargor therein described as transferred shall pass to and vest in the transferee freed and discharged from all liability on account of the charge in satisfaction whereof the land has been sold or of any charge registered subsequently thereto or of any attachment by order of Court, and the Collector shall upon the registration of such transfer make a memorial upon the register and issue documents of title cancelling such charge or charges."

Now the argument based upon the absence of any section corresponding to section 53 of the Registration of Titles Enactment No. 13 of 1911 can, I think, be easily disposed of. It must be remembered that the Land Code is not a mere re-enactment of the Registration of Titles Enactment with certain amendments. The whole scheme of the Enactment is entirely recast, and included in the Land Code are not only the provisions of the Registration of Titles Enactment but of the Land Enactment 1911 as well. It is quite unnecessary to particularize the various and important changes in the system of registration which were effected by the Land Code, but it may be pointed out that the Registration of Titles Enactment only dealt with land held under Certificate of Title and that land held under entry from the Mukim Register is dealt with under the provisions of the Land Enactment. The Land Code, on the other hand, deals with both forms of title and the first portion of Part X, sections 129 to 140, deals with charges on both forms of title, though separate provisions are made in cases of default, sections 141 to 148 dealing with land held under entry in the Mukim Register, and sections 149 to 154 with land held under Certificate of Title. The safest course is wherever possible to gather the intention of an Enactment from the Enactment itself, and the following sections appear to me to indicate its meaning. Section 42(1) which declares the indefeasibility of the title of a proprietor etc., is not taken from any special section of the earlier Enactment, though it gives effect to the general intention expressed in various other provisions. This section, so far as the present case is concerned, may be read in conjunction with section 96 which provides that upon the registration of any instrument "in manner heretofore prescribed" the land or interest specified shall pass. One of the instruments theretofore described is an instrument of transfer (section 91). Then we find that by

section 152 the bailiff's certificate shall be accepted by the Registrar as a valid instrument of transfer. The effect of this is that the purchaser of charged land is under the Land Code entitled to be registered as proprietor with an indefeasible interest, and any section corresponding to section 53 of the Registration of Titles Enactment would be entirely superfluous. No inference, therefore, can be drawn from the absence of such a section.

With reference to the argument based upon section 147(1), it is true that this section leaves the question free from doubt only so far as land held under entry in the Mukim Registration is concerned. It may be observed that this section had no counterpart in provisions of the Land Enactment 1911 which dealt with sales of such land by the Collector (see sections 47 and 47A). I think that the only reasonable explanation is that in the case of land held under Mukim Register the Land Code attempts to set out in detail every step to be taken by the Collector, whereas in the case of land held under Certificate of Title the sale is under Order of Court and detailed provisions are not necessary, as the Court can from time to time make such orders as are requisite.

In considering the effect of section 152 the learned Judge asked the very pertinent question 'What has become of the charge?' The same difficulty arises under section 147(1). I had occasion to consider this section in the case of *Collector of Land Revenue, Klang* v. *Tan Toh & anor.*, (1933—1934) F.M.S.L.R. 135 and I pointed out that although it expressly cleared the title from the charge in respect of which the particular land was sold, it gave no indication as to what the Collector was to do with the registration and duplicate copies of the Memorandum of Charge. I also expressed the opinion that section 130 (Discharge of Charge) had nothing to do with the matter, as it clearly dealt with something quite different, viz. the full or partial discharge of a charge by the chargee as an act *inter partes*, and not with a discharge full or partial, brought about by the sale of the land over the head of the chargor.

Now, it is to be observed that section 130 is one of the sections in Part X which is common to both classes of land, and besides that it deals with both aspects of the charge, i.e. the chargor's debt to the chargee and the charge on the land itself. Sections 141 to 148, however, while dealing with the default by the chargor of land held under entry from the Mukim Register, are only concerned with the land *vis-a-vis* the purchaser from the Collector. The other aspect of the charge, therefore, which involves the personal obligation of the chargor to the chargee, does not come into it. In the same way sections 149 to 154 only deal with land *vis-a-vis* a purchaser under order of Court. It would perhaps have been more logical if both parts had specified what should happen to the register and duplicate copies of the charge, but in the absence of any special provisions I am inclined to think that the Registrar of Titles and the Collector must act on the analogy of the procedure indicated in section 130, and to this extent I would wish to qualify my observation in the case cited that section 130 had nothing to do with the matter. If this is the correct view, then on a sale at the instance of the chargee it would be correct for him to sign a memorandum of discharge in Form XXV(a) or XXV(b) according as to whether the amount realized by the sale was sufficient to discharge the charge in whole or in part. That would afford a sufficient explanation of the two memorials 288/34 and 289/34 above referred to. The first memorial is really only relevant to the chargor's liability to pay the balance to the chargee. Strictly speaking it does not concern the land. The second memorial, however, which is in accordance with the bailiff's certificate, concerns the land only and does not affect the chargor's liability for the balance of the money. The two memorials are complementary to one another and looked at in this light are neither illogical nor inconsistent.

There is one further argument that should be noticed. It is that section 111 applies. This section is applicable to the case of a chargor transferring land subject to a charge. Mr. Goho sought in aid section 42(1), the indefeasibility section, and argued that the proprietor's title was indefeasible except for fraud or misrepresentation. Mr. Goho, however, had to admit that the proprietor could charge or transfer his land, otherwise he would not have mentioned section 111, and in order to apply his argument to the facts of the present case he submitted that the bailiff must be treated as the agent of the chargor and that the certificate must be regarded as a transfer under section 111. I am, however, quite unable to agree that the proprietor can only lose his land by an act of his own volition. Not only in the case of a charge but in the case of an attachment (section 108) and in the case of a sale to make good arrears of land rent (section 214) it is quite clear that a title can be given to a purchaser without reference to the former proprietor. These provisions have in fact the effect of a statutory conveyance vesting in a purchaser what was formerly vested in the registered proprietor and without any question of fraud or misrepresentation entering into the matter.

I have not thought it necessary to refer to legislation in other countries, as the provisions are

generally so different as to afford little help. I might mention, however, the Fiji Ordinance, as some of the provisions of that Ordinance have been reproduced in the Land Code. But on the particular question now before the Court the provisions in Fiji are quite different. Instead of the provisions for reducing the reserve price and giving the chargee liberty to bid, the Fiji Ordinance provides that if the upset price is not reached the mortgagee is to be regarded as the purchaser and his claim on the covenant to pay is wiped out i.e. the land has to be taken as a complete offset to the debt. Such a provision is, so far as I know, peculiar to Fiji and has the statutory effect of a foreclosure which cannot be reopened. There is no such provision in the Land Code and I should be unwilling to imply any such provision in the absence of any express section to that effect.

In the course of the argument Mr. Goho was obliged to concede that the Land Code made no distinction whatever whether the purchaser was an outside party or the chargee himself Accordingly where the chargee is himself the purchaser it is a misnomer to describe what has happened as a foreclosure. He becomes the purchaser at a judicial sale in which the asset has been valued under the supervision of the Court. The distinction between a judicial sale and a foreclosure is succinctly explained in the Privy Council case of *Gordon Grant* v. *Boos*, (1926) A.C. 781 and although the Trinidad Code is widely different from the F.M.S. Land Code, I think that the principle there established is entirely applicable.

For all these reasons I am of opinion that when land is sold at the instance of a chargee it vests in the purchaser free from the charge in respect of which the land was sold and all subsequent charges, and it makes no difference whether the purchaser is the chargee himself or a stranger. I also find that the original charge consisted of two parts, and that it is only the land which is discharged when a sale has been effected under order of Court. I can see nothing in the Land Code to relieve the chargor of his liability to repay the balance of the money which he has borrowed.

I would, therefore, allow the appeal and direct judgment to be entered for the appellant for the amount claimed with interest and costs both here and in the Court below.

Appeal allowed.